Supreme Court, U.S.
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No. 01-991

In The

Supreme Court of the United States

JEANNE MARIE DANA,

Petitioner,

v.

CHEMICAL BANK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the Respondent, Chemical Bank, hereby states that it is now known as J.P. Morgan Chase Bank, whose parent company is J.P. Morgan Chase & Co. Other than J.P. Morgan Chase & Co., there are no parent, subsidiary, or affiliates of Chemical Bank which have issued shares to the public.

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COUNTER-STATEMENT OF THE CASE

Preliminary Statement

This petition challenges two distinct appeals to the United States Court of Appeals for the Second Circuit. The first concerns the Second Circuit's affirmance of a summary judgment which was entered in favor of the Respondent against a party *other* than the Petitioner; the second concerns the Second Circuit's affirmance of a judgment entered in favor of the Respondent against the Petitioner after a jury trial. As outlined below, the Petitioner's arguments should be rejected because she lacks standing to challenge a judgment which was not entered against her, and because the Second Circuit's decisions were otherwise in accordance with well-settled law. Moreover, the Petitioner has failed to set forth any compelling reason why this Court should exercise its discretion to review the challenged decisions of the Second Circuit. Accordingly, the Respondent respectfully submits that the petition should be denied.

The Claim Against Dana

This action arises out of the failure of Petitioner Jeanne Marie Dana ("Dana") to honor the absolute and unconditional guarantee which she executed in favor of Respondent Chemical Bank ("Chemical"). At trial, Dana attempted to convince the jury that she should not be bound by her guaranty because (she claimed) Chemical's employees were incompetent and somehow misled her into believing that the guaranty which she voluntarily executed should not be honored in accordance with its

terms. Fortunately, the jury saw through Dana's contrived and unsupportable fable and soundly rejected it.

On appeal, Dana did not argue that the jury's findings were unsupported by the evidence. Instead, Dana shifted her focus to the conduct of the trial judge, whom she claimed deprived her of a fair trial. Specifically, Dana argued, as she does here, that the trial judge exhibited bias by asking her questions on the witness stand. The Second Circuit Court of Appeals appropriately rejected Dana's argument on the grounds that no bias was shown and that the judge gave the jury a curative instruction which was substantially similar to the one Dana's counsel requested, which instruction was "more than sufficient to overcome any potential prejudice." (*See* Petition for Writ of Certiorari ("Pet.") at 20a.)

Notwithstanding the fact that Dana's claim of trial error is neither "compelling" nor has any impact outside of this particular case, Dana seeks further review by this Court. For the reasons set forth below, Dana's petition for a writ of certiorari should be denied.

The Claim Against Connaught

At the time the action against Dana on her guaranty was commenced in June 1992, Dana's principal asset was valuable waterfront property located in Westport, Connecticut (the "Westport Property"). On July 30, 1992, Dana fraudulently conveyed the Westport Property, worth millions of dollars, to defendant Connaught Properties, Inc. ("Connaught") – a corporation which she owned and controlled. The purpose of Dana's fraudulent conveyance of her principal asset to her own corporation

was to defraud Chemical, which was her principal creditor.

On or about September 13, 1994, Chemical sought leave to amend its complaint in order to assert a fraudulent conveyance count against Connaught. On September 23, 1994, Connaught filed for protection under the United States Bankruptcy Code. Due to Connaught's bankruptcy filing, Trustee Richard Coan ("Trustee" or "Trustee Coan") was appointed by the Bankruptcy Court to protect the interests of the creditors of Connaught in this litigation.

For various reasons, none of which are relevant to Dana's petition, the district court severed the action so that the trial proceeded solely against Dana on her guaranty. The remaining portion of the case, which pertained to Connaught and Chemical's fraudulent conveyance claims, was submitted to the court by virtue of cross motions for summary judgment which were filed by Chemical, and by Trustee Coan on behalf of Connaught. Dana was not a party to the summary judgment proceedings.

The district court granted Chemical's motion for summary judgment. The court found a fraudulent conveyance and imposed a constructive trust against Connaught in favor of Chemical. On appeal to the Second Circuit, Trustee Coan challenged the imposition and effect of the constructive trust, but did not challenge the court's finding of fraudulent conveyance. Dana was not a party to that appeal.

The Second Circuit rejected Trustee Coan's arguments. The Second Circuit's ruling is well supported by

Connecticut and federal law. In an apparent concession to the validity of the Second Circuit's analysis and conclusions, Trustee Coan has elected not to petition this Court for certiorari.

Since Dana was not a party to the Connaught summary judgment proceedings or the Second Circuit appeal arising therefrom, she lacks standing to petition this Court for plenary review. Even if she had such standing, however, her petition should still be denied because the district court's decision and the Second Circuit's affirmance of that decision was correct.

REASONS FOR DENYING THE PETITION

I.

DANA LACKS STANDING TO CHALLENGE THE SECOND CIRCUIT'S CONSTRUCTIVE TRUST DETERMINATION

Dana's challenge to the Second Circuit's affirmance of the district court's imposition of a constructive trust should summarily be rejected because Dana lacks standing to raise it. As the Second Circuit's Summary Order makes clear, the issue of the district court's imposition of a constructive trust was litigated by and between appellant Richard Coan, as trustee of Connaught's bankruptcy estate, and Chemical Bank. The appeal on the constructive trust issue arose out of the district court's action in granting Chemical's motion for summary judgment against Trustee Coan. Dana was not a party to the motion for summary judgment, nor was she a party to Trustee Coan's appeal to the Second Circuit. The Second Circuit

explained the procedural history of this complicated matter as follows:

> The District Court severed the trial, which then proceeded against Dana alone [relating to her liability under the guaranty]. The remaining action *against Coan* [relating to the constructive trust] was resolved by the District court's order granting Chemical's motion for summary judgment as to the fraudulent conveyance claim, granting its motion to recover on its second attachment, and denying Coan's cross-motion in opposition.

(Pet. at 3a) (emphasis added).

Since no judgment relating to the fraudulent conveyance count was entered against Dana, she has no standing to petition this Court for certiorari. *See Penfield Co. v. SEC*, 330 U.S. 585, 589 (1947) ("Neither the District Court nor the Circuit Court of Appeals rendered judgment against Penfield. Nor is any relief sought by or against it here. Accordingly the writ [of certiorari] is dismissed as to Penfield."); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) (stating that a party invoking federal court's decisional and remedial powers "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). Dana's lack of standing is fatal to her petition.

II.

THE SECOND CIRCUIT'S CONCLUSION THAT CHEMICAL, AS BENEFICIARY OF A CONSTRUCTIVE TRUST, TAKES PRIORITY OVER THE TRUSTEE IS CONSISTENT WITH THE BANKRUPTCY CODE

A. The Bankruptcy Code Does Not Permit the Trustee to Exert Control Over Property Which is Not Part of the Bankruptcy Estate

The Trustee's inability to utilize his strong-arm powers to deprive Chemical of its rights under the constructive trust theory stems from the fact that the Trustee cannot exert control over property which is not part of Connaught's bankruptcy estate. Section 541(d) of the Bankruptcy Code excludes various equitable interests from the bankruptcy estate. That section provides, in relevant part, that:

> [Property] in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

Nowhere in the statute is there any support for the proposition that section 541(d) excludes some equitable interests, but not others. To the contrary, as pointed out in *In re Dameron*, 206 B.R. 394 (Bankr. E.D. Va. 1997), "it has been held that the legislative history of the section indicates that Congress 'clearly intended the exclusion created by section 541(d) to include not only funds held in express trust, but also funds held in constructive trust.' "

Id. at 400 (*quoting Official Comm. of Unsecured Creditors v. Columbia Gas Sys., Inc.*, 997 F.2d 1039, 1059 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994)); *see also Mitsui Mfrs. Bank v. Unicom Computer Corp.*, 13 F.3d 321, 324 (9th Cir. 1994); *In re Mid-Atlantic Supply Co.*, 790 F.2d 1121, 1124-25 (4th Cir. 1986).

This Court has previously acknowledged that Section 541(d) establishes that the Code will not ratably distribute among a debtor's creditors property that belongs to third parties. *See Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135-36 (1962) (stating that the law "does not authorize a trustee to distribute other people's property among a bankrupt's creditors"); *see also In re Atlantic Mortgage Corp.*, 69 B.R. 321, 330 (Bankr. E.D. Mich. 1987) (holding that the rights of constructive trust beneficiary are superior to trustee's because "Congress did not mean to authorize a bankruptcy estate to benefit from property that the debtor did not own") (citations and internal quotation marks omitted).

As discussed below, Connaught did not hold equitable title to the Westport Property. Accordingly, it could not be deemed property of Connaught's bankruptcy estate, as the Second Circuit properly found.

B. The Second Circuit's Decision is Well-Supported

From reading Dana's brief, one might be left with the impression that the Second Circuit's subordination of the Trustee's interests to those of Chemical, as beneficiary of a constructive trust, is novel. To the contrary, the Second

Circuit's decision is not only supported by its longstanding precedents, but also by numerous other courts, at all levels, throughout the country. *See, e.g., In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 352 (2d Cir. 1992) (holding that a constructive trust "confers on the true owner of the property an equitable interest in the property superior to the trustee's") (citations and internal quotation marks omitted); *In re Howard's Appliance Corp.*, 874 F.2d 88, 93 (2d Cir. 1989) (same); *In the Matter of Quality Holstein Leasing*, 752 F.2d 1009, 1015 (5th Cir. 1985) ("In summary, we find that the courts below erred in concluding that section 544 empowers a bankruptcy trustee to retain for the benefit of the estate property that the debtor obtained by fraud and upon which state law has imposed a valid constructive trust."); *In re Moravia Surplus & Supplies, Inc.*, No. 95-CV-1281, 1997 WL 538900, at *2 (N.D.N.Y. August 28, 1997) (stating that imposition of constructive trust confers on beneficiary equitable interest which is superior to bankruptcy trustee) (Pooler, J.); *In re K Chemical Corp.*, 188 B.R. 89, 97 (Bankr. D. Conn. 1995) ("[A] constructive trust thereby confers on its beneficiary an equitable interest in the trust res which is superior to that of a bankruptcy trustee.") *aff'd*, No. 3:95CV2681 (EBB), 1999 WL 464531 (D. Conn. 1999); *In re Atlantic Mortgage Corp.*, 69 B.R. at 330 ("As a general rule, it must be held that section 541(d) prevails over the trustee's strong-arm powers.") (citations and internal quotation marks omitted); *In the Matter of Triple A Coal Co.*, 55 B.R. 806, 813 (Bankr. S.D. Ohio 1985) ("Under the [constructive trust] theory, the money never becomes part of the bankruptcy estate. The beneficiary's equitable right

to it under 11 U.S.C. § 541(d) prevails over the bankruptcy trustee's strong-arm powers under 11 U.S.C. § 544, since the trustee holds only legal title to the money."); *In re Vermont Real Estate Inv. Trust*, 25 B.R. 813, 816 (Bankr. D. Vt. 1982) (where constructive trust prevails, "funds provided by the Plaintiff should be returned rather than be included in the Debtor's estate under Section 541 of the Code"); *In Matter of Faber's, Inc.*, 360 F. Supp. 946, 947 (D. Conn. 1973) ("Imposition of such a [constructive] trust would mean that the [assets at issue] would be excluded from the bankrupt's estate.").

While Dana attacks the Second Circuit's decision on the grounds that its interpretation of Connecticut state law may be at odds with certain other states, the law is clear that the Bankruptcy Code specifically contemplates the lack of uniformity among the states when dealing with bankruptcy issues. As this Court previously has acknowledged:

> Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, *priorities of payment and the like*. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the states.

Butner v. United States, 440 U.S. 48, 54 n.9 (1979) (*quoting Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)) (emphasis added; internal quotation marks omitted).

C. Dana Overstates the Conflict Between the Second Circuit's Decision and the Decision of the Sixth Circuit in *In re Omegas Group*

Dana's claim that a conflict between the Circuits exists is predicated primarily on the Sixth Circuit's decision in *In re Omegas Group, Inc.*, 16 F.3d 1443 (6th Cir. 1994). Dana's argument, however, overstates the significance of the *Omegas* decision. While clearly the *Omegas* court disfavored the use of constructive trusts to elevate the interests of constructive trust beneficiaries over the bankruptcy trustee, the Sixth Circuit's decision was based, at least in part, on the fact that Kentucky law, which it was obligated to apply, did not support imposition of a constructive trust under the facts of that case because of the nature of the business relationship of the parties and because the creditor seeking imposition of a constructive trust came to the court with unclean hands. *Id.* at 1451.

Furthermore, the *Omegas* case is distinguishable because, as recognized in the concurring opinion, the case should have been decided solely on the grounds that, under Kentucky law, "a constructive trust only comes into being at the time of its judicial creation." *Id.* at 1455.[1]

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[1] The Supreme Court has made clear that "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner*, 440 U.S. at 54.

Since there was no judicial creation of a constructive trust until after the debtor's bankruptcy filing, Judge Guy would have reversed the trial court without opining as to whether a trustee's strong-arm powers elevate a bankruptcy estate's interests in property over the interests of a constructive trust beneficiary.

In contrast, under applicable Connecticut law, "[p]roperty fraudulently conveyed may, as to the creditors of the grantor, be treated as if no conveyance of it had been made." *Murphy v. Dantowitz*, 142 Conn. 320, 325-326, 114 A.2d 194 (1955), *overruled on other grounds, Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 54, 459 A.2d 503, 507 (1983). There is no dispute that Dana's conveyance of the Westport Property to Connaught occurred prior to the time that Connaught filed its bankruptcy petition. If that conveyance were deemed never to have been made, the property never could have become part of Connaught's bankruptcy estate.

Dana's criticism of the Second Circuit's application of Connecticut law with respect to the "retroactive" effect of constructive trusts is misplaced, as Connecticut seems to have adopted the majority view on the issue. *See In re Dameron*, 206 B.R. at 399 ("Actually, the [Sixth Circuit's finding in *Omegas]* of when a constructive trust arises under common law is the minority view under a split of authority on the issue."); *see also Curtis Mfg. Co. v. Plasti-Clip Corp.*, 933 F. Supp. 94, 106 (D. N.H. 1995) ("[A] constructive trust arises at the time of the occurrence of the events giving rise to the duty to reconvey the property.") (citations and internal quotations omitted); *In re Atlantic Mortgage Corp.*, 69 B.R. at 328, 330 (same); *Cap.*

Investors Co. v. Ex. of Morrison's Est., 800 F.2d 424, 427 n.5 (4th Cir. 1986) (same).

Dana's bald and unsubstantiated claim that the Second Circuit's reasoning has been "questioned" by the Seventh Circuit in *Belisle v. Plunkett*, 877 F.2d 512 (7th Cir. 1989), must also be rejected. Contrary to Dana's argument, the decision in *Plunkett* actually supports the Second Circuit's holding. In that case, the Seventh Circuit held that the trustee was entitled to recover for the estate certain partnership interests that were held in constructive trust for various defrauded partners. In so holding, the court acknowledged that "[s]ections 544(a)(1) and (2) follow state law . . . in giving the trustee no *greater* rights than the judgment creditor would have. *Id.* at 515 (emphasis in original). The *Plunkett* court found, however, that the trustee had priority over the partnership interests because, under state law, a bona fide purchaser (such as the trustee) would have taken priority over the partners where, as in that case, the partners "neglected to record" their partnership interests. *Id.* In the present case, Connecticut law afforded Chemical priority over the Trustee as beneficiary of a constructive trust and there is no indication that the Seventh Circuit would not have reached the same result. Since this issue turns, in any event, on the interpretation of state law, there is no issue appropriate for resolution by this Court.

III.

THE TRIAL COURT'S QUESTIONING OF DANA WAS APPROPRIATE AND DID NOT CAUSE DANA ANY PREJUDICE

A. No Compelling Reason Exists for Granting Dana's Petition With Respect to her Claim of Trial Error

Rule 10 of the Rules of the Supreme Court of the United States makes clear that: "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Moreover, Justice Stevens has pointed out that the Court's "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J. concurring).

In her petition, Dana contends that the district court, by inquiring of her on the witness stand, committed error. The Second Circuit Court of Appeals disagreed, and now Dana would have the Supreme Court of the United States consider this argument yet again – notwithstanding the fact that it has no consequence to any case other than her own. Because this Court's certiorari jurisdiction is not intended to encompass the mere correction of errors in particular cases, Dana's petition should be denied.

B. Dana Was Not Prejudiced as a Result of the Trial Court's Conduct

The questioning of Dana by the trial judge occurred on the last day of evidence. While Dana's counsel did assert an objection to the court's questioning, he never

requested that the court grant a mistrial, nor did he request an instruction that the court's line of questioning be disregarded. Rather, Dana's counsel requested only that the court instruct the jury that "this court has no interest in one side or the other, has no opinion and does not know anything and, clearly asked questions to try to assist the Jury." (Tr. p. 1151; A-462.)[2] In response to concerns raised by Dana's counsel, the district court assured both parties that she had "no opinion as to the merits of the case" and was propounding questions simply to assist the jury in "ascertaining what the facts are." (Tr. p. 1163; A-465.) Nevertheless, the court instructed both parties that they were free to object to her questions, and advised Dana's counsel that the court "would be happy to consider any charge that [counsel] would like to propose." (Tr. pp. 1152, 1163-1164; A-463, 465-66.)

Ultimately, the trial court charged the jury in accordance with Dana's wishes. Specifically, the court made clear that its questions were not meant to indicate any opinion about the weight or effect of testimony or evidence, and that the jury should disregard the number of questions which it asked or the fact that it did not ask questions of some witnesses. (Tr. pp. 1366-1369; A-517.) As the Second Circuit appropriately concluded, this charge was "more than sufficient to overcome any potential prejudice" to Dana. (*See* Pet. at 20a (*citing United States v. Vega*, 589 F.2d 1147, 1153 (2d Cir. 1978); *United States v. Berardelli*, 565 F.2d 24, 30 (2d Cir. 1977), *rejected on other grounds by United States v. Apfelbaum*, 445 U.S. 115

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[2] Citations are to the Appendix submitted to the United States Court of Appeals for the Second Circuit.

(1980); *United States v. Natale*, 526 F.2d 1160, 1170 (2d Cir. 1975)).

C. Dana Failed to Preserve Her Claim of Error

As noted above, Dana's counsel, in response to the trial court's questioning of Dana, requested only that the court instruct the jury that "this court has no interest in one side or the other, has no opinion and does not know anything and, clearly asked questions to try to assist the Jury." (Tr. p. 1151; A-462.) The court accommodated this request and incorporated it into its charge to the jury. Dana's counsel failed to object to the trial court's charge. Dana's failure to object to the court's jury charge precludes her from claiming prejudice on appeal. *See* Fed. R. Civ. P. 51 ("[N]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); *see also Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992) (failure to object to a jury instruction at trial waives consideration of claims relating to that charge on appeal). Dana's failure to object to the district court's charge, standing alone, is sufficient to deny her petition for further appellate review.

D. The Court's Questioning of Dana Did Not Depart from the Accepted and Usual Course of Judicial Proceedings

In asserting her argument that the trial court departed from the accepted and usual course of judicial

proceedings by questioning her on the witness stand, Dana conveniently ignores Rule 614 of the Federal Rules of Evidence. That rule provides, in relevant part, that the "court may interrogate witnesses, whether called by itself or by a party." Fed. R. Evid. 614; *see Vega*, 589 F.2d at 1153 (holding that limited interrogation of witnesses by trial court is "entirely appropriate" and "specifically approved by the Federal Rules of Evidence") (citations omitted); *United States v. Williams*, 575 F.2d 388, 392 (2d Cir.) ("[W]e have recognized that a trial judge had the authority to put inquiries where it is 'necessary to clarify testimony and assist the jury in understanding the evidence.' ") (citations omitted), *cert. denied*, 439 U.S. 842 (1978). Not only has Dana failed to demonstrate that the district court's questioning was inappropriate in any respect, but she has fallen far short of meeting her burden of justifying further review of this issue by this Court.

CONCLUSION

Certiorari is not warranted because Dana has failed to establish compelling reasons why this Court should accept this case for plenary review. Even if Dana had standing to raise her arguments, they amount to nothing more than a duplicative attempt to re-litigate an action which has already consumed far more judicial resources than have ever been warranted.

Accordingly, Dana's petition for a writ of certiorari should be denied.

Respectfully submitted,

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